

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Adolfo Gutierrez Avila, Jr.,

Case No. 20-CV-1767 (DSD/ECW)

Plaintiff,

v.

REPORT AND RECOMMENDATION

Jeff Titus, being sued in his individual
capacity,

Defendant.

This matter is before the Court on this Court's Report and Recommendation and Order (Dkt. 10).¹

As part of its January 6, 2021 Order (Dkt. 10), this Court found as follows:

More than four months have passed since Avila was authorized to proceed with this action against Titus, and yet service has not yet been effected. Under Rule 4(m) of the Federal Rules of Civil Procedure, "[i]f a defendant is not served within 90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time." More than 90 days have now passed since the filing of the initial complaint and this Court's authorization of suit under § 1915A. Accordingly, Avila is now directed to effect service of process upon Titus by no later than March 1, 2021, failing which it will be recommended that this matter be dismissed without prejudice pursuant to Rule 4(m).

(Dkt. 10 at 2-3.)

¹ The Court notes that the Report and Recommendation dismissing Rush City Correctional Facility as a defendant was adopted by United States District Judge David S. Doty in his February 2, 2021 Order. (Dkt. 13.)

The Court ordered that “Avila must effect service of process consistent with Rule 4 of the Federal Rules of Civil Procedure by no later than **March 1, 2021**, failing which it will be recommended that this matter be dismissed without prejudice.” (*Id.* at 3 (emphasis in original).)

As of the date of this Report and Recommendation, Avila has provided no evidence that he effectuated service on Defendant Jeff Titus or any good cause for failing to serve him for the last five months, let alone since the initiation of this action on August 13, 2020. Federal Rule of Civil Procedure 4(m) requires a court to dismiss an action without prejudice against a defendant who is not served within 90 days after the complaint is filed, unless the plaintiff shows good cause for the failure. The Eighth Circuit has approved of *sua sponte* dismissal for failure to serve a defendant, so long as the dismissal is without prejudice. *See Hoffmann v. United States*, 21 F. App’x 528, 529 (8th Cir. 2001) (per curiam) (unpublished opinion) (holding that failure to serve under Rule 4(m) warranted a *sua sponte* dismissal without prejudice).

Having shown no evidence of service or good cause for Plaintiff’s failure to serve Titus since the initiation of this action in August 2020 or this Court’s January 6, 2021 Order, the Court recommends dismissal of this action without prejudice pursuant to Rule 4(m).

RECOMMENDATION

Based on the above, and on the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that: the individual capacity claims against Defendant

Jeff Titus be **DISMISSED WITHOUT PREJUDICE** pursuant to Federal Rule of Civil Procedure 4(m).

Dated: May 11, 2021

s/Elizabeth Cowan Wright
ELIZABETH COWAN WRIGHT
United States Magistrate Judge

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), “a party may file and serve specific written objections to a magistrate judge’s proposed finding and recommendations within 14 days after being served a copy” of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. *See* Local Rule 72.2(b)(2). All objections and responses must comply with the word or line limits set forth in Local Rule 72.2(c).